No. 75-1805

In the Supreme Court of the United States

OCTOBER TERM, 1976

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
JOHN J. KLEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 1101.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1976. A petition for rehearing was denied on May 18, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Double Jeopardy Clause, petitioner's conviction of conspiracy to distribute narcotics barred his subsequent prosecution and punishment for engaging in a continuing criminal enterprise.

STATUTES INVOLVED

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. 848 provides in pertinent part:

> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

STATEMENT

The evidence, as summarized by the court of appeals (Pet. App. 2-4), showed that petitioner was the head of a sophisticated narcotics distribution network that operated in Gary, Indiana, from January 1972 to March 1974. The organization, known as "the Family," was formed by petitioner and five others. Although petitioner initially served only as treasurer of the Family, he quickly assumed control and transformed the cooperative venture into his personal enterprise.

The Family distributed 1,000 to 2,000 capsules of heroin a day and had net receipts (after commissions to street distributors) of about $5,000 a day. The court of appeals estimated that petitioner's income from these operations during the two-year period exceeded $1 million (Pet. App. 4). To assure control over the narcotics distribution in Gary, the Family engaged in robbery and extortion of other drug dealers. Petitioner, in turn, maintained control over the Family by beating and shooting members who he determined should be disciplined.

In March 1974, indictments were returned in the United States District Court for the Northern District of Indiana charging petitioner with conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. The government sought to consolidate the two indictments for trial. Petitioner objected to consolidation on the ground, among others, that the two offenses were not the same and that consolidation would be prejudicial. The court ordered that the charges be tried separately (Pet. App. 5-6).

In June 1974, after a jury trial, petitioner and six co-defendants were convicted as charged under the conspiracy indictment. Petitioner was sentenced to fifteen years' imprisonment and three years' special parole and was fined $25,000. The court of appeals affirmed (520 F. 2d 1256).

In March 1975, after another jury trial, petitioner was convicted as charged under the continuing criminal enterprise indictment. He was sentenced to life imprisonment, to be served consecutively to his sentence

on the conspiracy conviction, and was fined $100,000. The court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioner's sole contention is that his prosecution and punishment for engaging in a continuing criminal enterprise was barred, under the Double Jeopardy Clause, by his previous conviction and sentence for conspiracy.[1] The contention rests on two premises: first, that "a conspiracy is a lesser included [offense] of a continuing criminal enterprise" (Pet. 13); second, that under the Double Jeopardy Clause "a conviction of a lesser included offense bars prosecution for the greater offense" (Pet. 8).

The court of appeals accepted the first premise (Pet. App. 7-8) but rejected the second (Pet. App. 11-19). It agreed that conviction of a lesser included offense ordinarily bars subsequent prosecution for the greater offense (Pet. App. 8-10). It held, however, relying on this Court's decision in *Iannelli* v. *United States*, 420 U.S. 770, that, "at least in the area of complex statutory crimes, if Congress intends that two offenses be retained as independent offenses, prosecution under both is permissible," even if one is included within the other (Pet. App. 11). Since Congress intended the offense of engaging in a continuing criminal enterprise to be "a substantially separate crime" from conspiracy (Pet. App. 18), the court concluded that petitioner's present

[1]Petitioner appears to object both to the second prosecution as such and to the cumulative nature of the punishment imposed on his second conviction. But since petitioner "objected strenuously" to the government's effort to consolidate the two indictments for trial, arguing that "conspiracy and continuing criminal enterprise were not 'the same' " (Pet. App. 6), he should not now be heard to complain that he was subjected to successive trials instead of only a single consolidated trial.

conviction was not barred by the prior conspiracy conviction (Pet. App. 19).

Like the court of appeals, we believe that *Iannelli* is controlling. In our view, however, that decision also requires rejection of petitioner's *first* premise—*i.e.*, that conspiracy is a lesser included offense of engaging in a continuing criminal enterprise. It is therefore unnecessary in this case to determine whether, in light of the congressional intent, the present prosecution would be permissible even if conspiracy *were* a necessarily included offense.

As petitioner acknowledges, the lesser included offense question turns on "whether or not a continuing criminal enterprise can be committed without a conspiracy" (Pet. 14). A person is engaged in a "continuing criminal enterprise" if he commits a federal narcotics felony and if the felony is part of a continuing series of federal drug violations "(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources." 21 U.S.C. 848(b). Petitioner argues that one cannot act "in concert with" (*ibid.*) other persons in such an enterprise without entering into a criminal conspiracy with them (Pet. 12-13).

Since "[t]he essence of the crime of conspiracy is agreement" *Iannelli* v. *United States*, *supra*, 420 U.S. at 785, n. 17, the validity of petitioner's argument depends on whether the phrase "in concert with" means "pursuant to an agreement with." In *Iannelli*, this Court found that the similar language of 18 U.S.C. 1955—which makes it a crime to operate an illegal gambling business that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part

of such business"—does not require proof of an agreement among the participants (420 U.S. at 785, n. 17). Here, as in *Iannelli,* agreement is "an element not contained in the statutory definition of [the substantive] offense" (*ibid.*).

Although 21 U.S.C. 848(b) uses the phrase "in concert with five or more other persons," while 18 U.S.C. 1955 contains the phrase "involves five or more persons," the distinction is not significant here. Neither phrase requires proof of a conspiracy—*i.e.,* that there was a meeting of guilty minds. It is enough to show that the defendant acted with criminal intent, even if the other participants in the enterprise, with whom the defendant was acting "in concert," were innocent dupes unaware of the true criminal character of the enterprise.

In most cases, of course, the proof will show that the other participants themselves acted with criminal intent and that they were parties to a conspiracy with the defendant. But "the Court's application of the test focuses on the statutory elements of the offense," not on whether there is "a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States, supra,* 420 U.S. at 785, n. 17. So long as it is theoretically possible, as it is under 21 U.S.C. 848, to commit the substantive crime in the absence of a corrupt agreement, conspiracy is not a necessarily included offense. Since 21 U.S.C. 848, like 18 U.S.C. 1955, "pointedly avoids reference to conspiracy or to agreement" (*Iannelli, supra,* 420 U.S. at 789), there is no foundation for petitioner's contention that the former, unlike the latter, requires proof of a conspiracy.

It follows that petitioner was not twice put in jeopardy with respect to the same offense and that his prosecution and sentence for engaging in a continuing criminal

enterprise was not barred by his prior conviction and sentence for conspiracy.

Furthermore, the question whether one who engages in a continuing criminal enterprise necessarily commits a criminal conspiracy is not likely to be of recurring importance. This is, as far as we know, the only reported decision on the issue, and there is no reason to suppose that either successive prosecutions or cumulative punishments under the statutes involved here occur with any frequency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
JOHN J. KLEIN,
Attorneys.

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